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No. 89-1016

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# IN THE
# SUPREME COURT OF THE UNITED STATES
## October Term, 1989

RAFAEL HERNANDEZ COLON, individually and as Governor of the Commonwealth of Puerto Rico; Mercedes Otero de Ramos, individually and as Administration of the Corrections Administration of the Commonwealth of Puerto Rico, and Lorenzo Villalba, Juanita Gomez, Julio Acevedo Asencio, individually and as members of the Parole Board of the Commonwealth of Puerto Rico

Petitioners,

v.

CARLOS MORALES FELICIANO, et al.

Respondents.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF AMICI CURIAE FOR THE STATES OF NORTH CAROLINA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NEW MEXICO, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS**

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## QUESTIONS PRESENTED

1. Does the failure of Commonwealth officials to fully comply with a stipulation to provide a minimum of 35 square feet per prisoner, by itself, support a ruling by a federal court of appeals that such failure violates the Eighth Amendment, and that, for this reason, substantial compliance is insufficient to avoid civil contempt fines, as to which the decisions of this Court and of other courts of appeal are in conflict?

2. Does a federal court of appeals, even where an Eighth Amendment interest is involved, in reviewing the validity of civil contempt fines, correctly apply a strict standard of compliance with a stipulation to improve crowded prison conditions that considers only the interests of the prisoners, instead of a flexible standard that weighs, along with the interests of the prisoners, the interests of the state in law enforcement and public security, good faith efforts to fully comply, and substantial compliance, as to which the courts of appeal are in conflict?

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## INTEREST OF AMICI CURIAE

We [31] amici states all have either pending class action litigation against our prison systems alleging Eighth Amendment violations due to prison conditions or have entered into consent decrees to end such litigation.[1]

We are vitally concerned with the decision in the instant case. This case imposes upon the states a contempt standard for non-compliance which disregards the good faith attempts by the states to comply and conflicts with standards used in other circuits for reviewing compliance issues. This decision casts doubt on the continuing validity of the precedent of other circuits in this area, precedent the amici states necessarily took into consideration when negotiating consent decrees.

Institutional reform litigation is a nationwide problem and one which necessarily implicates the serious policy considerations of Federalism since it directly impacts on a state's ability to administer institutions traditionally within its sphere of interest. Conflicts among the circuits as to the standard applied to the states for their good faith failure to be in full compliance with a consent decree will result in discrepancies regarding enforcement nationwide of Eighth Amendment issues. Confusion generated by the differing standards will, in fact, impede the states' willingness to consent to agreements which are innovative and optimistic in institutional litigation since the states will be uncertain of what sanctions will be applied if the state, though in good faith, falls short of its expectations.

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1 Petitioners' Appendix E.

The First Circuit Court of Appeals has rendered a decision which is in serious conflict with precedent of this Court because it finds *per se* violations of the Eighth Amendment simply on square footage allotted each prisoner. The amici states need and seek a decision from this Court which will unify and reconcile the decisions among the circuits on the standards for reviewing non-compliance. The states also need and seek further guidance from the Court on the point at which prison overcrowding implicates the Eighth Amendment. This case presents an appropriate vehicle for this Court to address these issues which are vital to the states' interests in managing their institutions and maintaining criminal justice systems while adhering to the commands of the Federal Constitution.

## SUMMARY OF ARGUMENT

The decision of the First Circuit adopting a strict standard for reviewing public officials' compliance with consent orders is in conflict with the more balanced and flexible approach used by the Second, Third, Fourth and D.C. Circuits. This issue is of vital national importance because of the substantial growth in institutional reform litigation in recent years. The conflict between the Circuits will result in uneven enforcement of Eighth Amendment requirements and will cause confusion for public policy makers who may become increasingly unwilling to accept innovative agreements, opting for the least innovative rather than the best resolution to the litigation.

The First Circuit's decision is shockingly wrong because it automatically equates the violation of the Commonwealth's stipulation to provide certain square footage levels with a violation of the Eighth Amendment. This creates, in effect, a *per se* constitutional violation from a mere contractual breach. Such a holding is in irreconcilable conflict with *Rhodes v. Chapman*, 452 U.S. 337 (1981), where this Court rejected a lower court decision that overcrowding amounted to cruel and unusual punishment in the absence of a finding that the totality of the conditions of confinement deprived inmates of the "minimal measure of life's necessities." *Id.* at 347. The First Circuit's imposition of draconian fines assessed against the public treasury of Puerto Rico based on this fundamental error of law especially justifies review by this Court.

The strict standard applied by the First Circuit ignores important state interests and disrupts the delicate adjustment between federal equitable power and state administration of its own institutions and law.

Since this case squarely presents an opportunity for the Supreme Court to resolve this important issue upon which the circuits have split, certiorari should be granted.

## ARGUMENTS

### I. The First Circuit's Standard For Reviewing Compliance With Institutional Consent Decrees Creates A Conflict Among The Circuits On An Issue Of Vital National Importance.

In its opinion rejecting the Commonwealth's substantial compliance and good faith defenses to contempt sanctions, the First Circuit employed a strict standard of

review which limited analysis to the plaintiffs' interest in full compliance while failing adequately to consider the important state interests involved. The strict standard of compliance adopted by the First Circuit is in irreconcilable conflict with the more flexible and balanced approach employed by the Second, Third, Fourth and D.C. Circuits.[2] The Eighth Circuit applies the strict standard in reviewing compliance with institutional consent decrees[3], while the Fifth and Seventh Circuits have yet to articulate their standard though those circuits recognize the splits within the other circuits.[4] This Court has applied a strict standard to enforcement of consent decrees against private parties, *United States v. Swift & Co.*, 286 U.S. 106 (1932), but has not addressed the standard to be applied against public officials. With the circuits presently employing at least two different standards, this issue is now ripe for review by this Court.

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2 *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988); *Plyler v. Evatt*, 846 F.2d 208, 211-12 (4th Cir. 1988); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969-70 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

3 *Rajender v. University of Minnesota*, 730 F.2d 1110, 1116-17 (8th Cir. 1984).

4 *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987); *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985).

The issue is of vital national importance because of the substantial growth in institutional reform litigation which has taken place in recent years. To date nearly every state and territory has found itself embroiled in such actions. As of November 30, 1989, forty-one states plus the District of Columbia, Puerto Rico and the Virgin Islands were under court order or consent decree concerning prison conditions.[5] Local governments are also becoming increasingly enmeshed in overcrowding and compliance litigation partly as a result of the shift of state inmates to local confinement facilities and also because of the increased arrest rates attributable to a general rise in criminal activity, including drug-related crimes.[6]

Conflicts between the standards of compliance being employed by the Circuits will result in uneven enforcement across the nation of Eighth Amendment concerns and will cause confusion for public officials by raising doubt as to the continuing validity of any particular standard currently

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5 Petitioners' Appendix E.

6 *See, e.g., Harris v. Pernsley*, 820 F.2d 592 (3rd Cir. 1987)(Philadelphia); *Albro v. Onondaga County, N.Y.*, 677 F.Supp. 697 (N.D.N.Y. 1988); *Benjamin v. Malcom*, 659 F.Supp. 1006 (S.D.N.Y. 1987)(New York City). Some states such as North Carolina have resorted to legislative caps on the prison population which results in prison bound offenders being held for longer periods in local jails. N.C. Gen. Stat. § 148-4.1 (1987).

in effect in their jurisdiction. This is especially true in those Circuits which have not yet decided which standard to follow.

The product of that confusion is likely to be an increasing reluctance by public policy makers to experiment with innovative agreements for fear that they may be strictly held to the terms of a decree even if the costs or impact on operational concerns turn out to be, through factors beyond control of the policy makers, far heavier than predicted. The inclination of the prudent public official will be to bargain for the least, rather than the best and most enlightened agreement, at a time when the intractable problems of prison management most desperately call for innovation and a willingness to experiment with new solutions.[7]

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7 *See, e.g., Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3rd Cir. 1979), where the Court warned that:

> An approach to the modification of a complex affirmative injunction which over-emphasizes the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality. Even where the decree is litigated, if the power to modify were too closely curtailed the defendants might seek, and the courts might tend to impose, minimum affirmative obligtions, perhaps less than realistically achievable, for fear of becoming bound by unreasonable but unchangeable requirements. *Id.* at 1120

Because this case squarely presents the issue of the appropriate standard to be applied when enforcing compliance with institutional consent decrees it provides this Court with an ideal opportunity to harmonize federal law and give public policy makers the guidance they need. That guidance should be given now since much of the Eighth Amendment jurisprudence is beginning to mature beyond the initial litigation on underlying conditions to questions of good faith compliance with consent decrees.[8]

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8 Another example of the shift in emphasis to compliance issues is *Carruthers v. Duran*, 885 F.2d 1492 (10th Cir. 1989), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 17, 1989)(No. 89-786) in which similar issues as those presented here are presented in the context of the Tenth Circuit's refusal to *modify* a consent decree entered into by New Mexico.

## II. Noncompliance With A Court Approved Stipulation To Afford Prisoners With Specific Spatial Living Requirements Does Not Constitute A Per Se Eighth Amendment Violation Such That A Federal Court May Exercise Powers Of Civil Contempt In The Form Of Excessive Fines When Such A Ruling Is In Conflict With Prior Precedent Of This Court And Other Federal Courts Of Appeal.

The First Circuit's finding of an Eighth Amendment violation solely on the basis of a states' failure to comply fully with square foot projections agreed upon in a consent decree runs seriously afoul of this Court's prior precedent in *Rhodes v. Chapman*, 452 U.S. 337 (1981). Indeed, this case transforms contractual non-compliance with a desired goal[9] into an Eighth Amendment violation. This incorrect ruling affects not simply this isolated case, but has national implications due both to the amount of the sanction and the subject matter of the litigation. A federal court of appeals has sanctioned a ruling which creates a *per se* Eighth Amend-

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9 Petitioners, Commonwealth of Pureto Rico agreed to provide inmates with 35 square footage. This figure was based upon recommendations by correctional experts. Such recommendations, however, do not establish the constitutional minima. *Bell v. Wolfish*, 441 U.S. 520 (1979). *Also see Plyler v. Evatt*, 846 F.2d 208, 212 (4th Cir. 1988) where the Court said, "Consent decrees . . . in institutional reform cases are not so much peremptory commands to be obeyed in terms as they are future-oriented plans designed to achieve broad public policy objectives in a complex, ongoing fact situation." (quoting, *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 970 n. 17 (2nd Cir.), *cert. denied*, 464 U.S. 915 (1983)).

ment violation when this Court and other federal courts of appeal have declined on numerous occasions to broaden the Eighth Amendment to such an extent. Further, the remedy fashioned by the court in this case is inappropriate given the absence of a constitutional violation. Thus, the proper remedy for violation of the court approved stipulation is evocative of contractual remedy principles rather than constitutional ones.

In *Rhodes v. Chapman*, *supra*, the Court set about the task of defining the standard to be applied in the resolution of disputes concerning conditions of confinement under the Eighth Amendment. The Court refused to recognize any specific or isolated condition which resulted in a *per se* Eighth Amendment violation and stressed the need to proceed cautiously in making an Eighth Amendment judgment because "a decision that a given punishment is permissible under the Eighth Amendment cannot be reversed short of a constitutional amendment." *Id.* at 351 (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)). The majority stated that conditions which deprive prisoners of the "minimal civilized measure of life's necessities" could be considered cruel and unusual under contemporary standards of decency. *Id.* at 347. The opinion suggests that "life's necessities" include food, adequate medical care and sanitation. *Id.* at 348. The test articulated by the Court for similar Eighth Amendment disputes is both practically and realistically flexible. While the Eighth Amendment clearly prohibits the "unnecessary and wanton infliction of pain", this constitutional provision must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society". *Id.* at 346. Thus, the language and ideals espoused in *Rhodes* operate to discourage the judicial creation of *per se* Eighth Amendment violations with respect to cases involving prison conditions.

The United States Court of Appeals for the District of Columbia properly applied the letter and spirit of the *Rhodes* opinion in *Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C. Cir. 1988). Presented with a civil rights action brought by inmates including allegations of unconstitutional prison overcrowding, that court refused to recognize, without more, prison overcrowding as a constitutional violation. The decision in *Barry*, although consistent with the opinion of *Rhodes v. Chapman*, *supra*, is clearly in conflict with the First Circuit decision of *Morales Feliciano v. Parole Board*, 887 F.2d 1 (1st Cir. 1989), where the district court found that the Commonwealth's failure to abide by specific square footage requirements implicated the inmates' Eighth Amendment interest. *Id.* at 5.

Given the absence of a constitutional violation, the draconian fines imposed by the district court and subsequently upheld by the First Circuit Court of Appeals was improper as being within the nature of a constitutional remedy. On this note, this Court has discussed at length the remedial powers of the federal judiciary:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation[.]

*Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977).

Clearly, the First Circuit Court of Appeals exceeded appropriate limits in creating a constitutional violation when such a finding was in conflict with decisions of this Court and those of other circuits.

The First Circuit's decision is also in serious conflict with decisions of this Court because the strict standard of reviewing compliance it imposes does not permit consideration of important state interests. It disrupts the delicate adjustment between federal equitable power and state administration of its own institutions and law which is mandated by basic precepts of federalism recognized by this Court on numerous occasions. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Younger v. Harris*, 401 U.S. 37, 44 (1971).[10]

Unlike agreements entered between private parties, consent decrees adopted by public officials bind a vast number of individuals who have no ability or standing to protect interests that may or will be affected. Because the standard of review adopted by the First Circuit restricts

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10 The First Circuit's decision is also in conflict with other circuit courts which recognize the need to weigh federalism concerns in entering, modifying and enforcing consent decrees against state officials. *See, Plyler v. Evatt*, 846 F.2d 208, 211-12 (4th Cir. 1988); *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 340-41 (7th Cir. 1987); *Georgevich v. Strauss*, 772 F.2d 1078, 1089 (3rd Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1028 (1986); *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985). *Also see, Note, Federalism and Federal Consent Decrees Against State Government Entities*, 88 *Colum* L.Rev. 1796 (1988).

analysis to the plaintiffs' interest in full compliance it does not permit any attempt to accommodate both the plaintiffs' constitutional rights and the important state interests that are affected. Such a procrustean approach to the enforcement of institutional consent decrees runs afoul of this Court's mandate that federal courts be sensitive "to the legitimate interests of both the state and national governments . . .", *Younger* at 44, and that the courts should endeavor to protect federal rights and interests "in ways that will not unduly interfere with the legitimate activities of the states. Protection of the public from violent offenders is just such a legitimate activity. *Plyler v. Evatt*, 846 F.2d 208, 215 (4th Cir. 1988).

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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